IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8530 of 1998

with

SPECIAL CIVIL APPLICATION NO. 842 OF 1999.

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UNION OF INDIA

Versus

PREMA DHAMA AND ANOTHER

Appearance:
MR JJ YAJNIK for Petitioners

MR M.D.RANA, FOR RESPONDENT IN SCA. NO. 842 OF 1999

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE C.K.BUCH
Date of decision: 03/08/1999

ORAL JUDGEMENT

Per Thakker, J.:

In Special Civil Application No. 8530 of 1998, nobody appears on behalf of the respondent, though Notice was issued earlier and the respondent was served. In view of the fact, however, that we are not disturbing the order passed by the Central Administrative Tribunal, Ahmedabad Bench (`Tribunal'), it is not necessary now to keep the matter pending particularly when in a cognate matter, parties have appeared. Hence, we have proceeded to deal with both the matters on merits.

In Special Civil Application No. 842 of 1999, we have issued Rule. Mr Rana appears on behalf of the respondent and waives service of Rule. In the facts and circumstances of the case, we have taken up both petitions for final hearing.

In both the petitions, the orders passed by the Tribunal are challenged. Common question of law arises, as to whether- employees who have been retained in service after they reached the age of superannuation can be asked to refund the amount of salary which they have received, for the period they have worked and they have been paid by the railway administration.

In Special Civil Application No. 8530 of 1998, the date of birth of the respondent was March 22, 1935. It was not in dispute. He was, therefore, due to retire after completing the age of 58 years on i.e. March 31, 1993 being the last day of the month of March. It is not disputed that though he was due to retire on March 31, 1993, no action was taken by the railway administration and he was allowed to continue. It appears that thereafter, the railway administration came to know about the fact that the respondent was due to retire on March 31, 1993 and accordingly, an order was passed and he was retired with effect from September 8, 1994. Thus, he had worked for a period of one and half years. The railway administration in the light of the above fact asked him to refund the amount of salary which he had received for the work done. The respondent, therefore, approached the Tribunal by filing O.A. No. 337 of 1995 and the Tribunal by a decision dated February 2, 1999, allowed the application filed by him and restrained the authorities from recovering amount already paid to him as salary for the period for which he had actually worked. The Tribunal, however, held that he would be entitled to pensionary benefits on the basis of correct date of birth i.e. March 22, 1935. That order is challenged by the

railway administration.

In Special Civil Application No.842 of 1999, the case of the workman was that after partition in 1947, he entered this country on June 7, 1948 . At that time, it was stated that he was about 18 years of age. No other documentary evidence was available and on the basis of the fact that he entered this country on June 7, 1948 and his age was about 18 years, his date of birth was shown as June 7, 1930. He was taken in railway service on October 19, 1956. The case of the respondent was that in fact, his date of birth was July 6, 1937. For that, reliance was placed on an identity card issued by the Mechanical Engineer, Bhavnagar. In this case also, the railway administration did not do anything for quite long time. Then suddenly, on the basis of the date of birth said to have been recorded at the time of entry of the respondent in India, he was retired with effect from May 4, 1994 and he stood retired from that date. According to the railway administration thus, the respondent workman has retained in service after reaching the age of superannuation for about six years. According to the respondent workman, however, he was retired even prior to reaching the age of superannuation inasmuch as according to him, he would have reached the age of superannuation on July 6, 1995. In this case also,it is an admitted fact that the respondent had actually worked for which he was paid. In this case too, the railway administration wanted to recover salary which was paid to the workmana. The respondent, therefore, approached the Tribunal and the Tribunal allowed his application directing the railway administration not to recover the amount already paid , but has also held that he would be entitled to pensionary benefits on the basis of last pay drawn on the normal date of superannuation. That order is also challenged by the railway administration.

Mr. Yagnik for the petitioner drew our attention to two decisions of the Supreme Court. According to him, contradictory orders were passed by the Supreme Court in those two cases. In Radha Kisun vs. Union of India, JT. 1997 (4) SC 116, the employee who was in service was continued for three years after reaching age of superannuation without any order of reemployment or extension. On the date of superannuation, he was not retired from service. He, therefore, continued to discharge his duties and was paid salary. When the said fact came to the knowledge of the department, action was taken to recover the amount paid to him for the period beyond the date of his superannation and the said action was challenged. The Tribunal held hat since he was not

entitled to continue in service and yet he was continued, there was nothing wrong in directing him to refund the amount of salary for the period for which he had worked. He could not have been continued and he was not entitled to salary. Hence, if he was asked to refund the amount, it cannot be said that such action was illegal or contrary to law. A Division Bench of two Judges of the Supreme court confirmed the order of the Tribunal and held that there was no illegality in the order passed by the Tribunal and Special Leave Petition was dismissed.

On the other hand, in State of Bihar vs. Narsimha Sundaram , AIR 1994 SC 599,, the employee by suppressing his correct date of birth, remained in service beyond the date of retirement. He was not paid salary for the period for which he had worked after reaching correct date of superannuation. Since he was not paid salary for the period for which he had performed duties, he approached the High Court and the High Court directed the State Government to pay wages to him. Being aggrieved by the said order, the State authorities approached the Apex Court. A Division Bench of three Judges held that even though the employee had continued in service by suppressing his correct date of birth, since no inquiry was held against him and as he had worked, the order passed by the High Court directing State Government to pay salary for the peirod for which he had actually worked done cannot be said to be illegal. The appeal filed by the State was, therefore, dismissed.

Attention of the Tribunal was invited to both the above orders of the Apex Court. The Tribunal, however, observed that in the facts and circumstances of the cases, it was not necessary to enter into the larger question as to which of the two decisions should be followed as the matters could be decided in the light of guidelines issued by the railway administration on April 28, 1989. In para 8, the Tribunal observed as under:-

> "8. Having carefully considered the rival contentions of the parties and having carefully gone through the two judgments of the Honourable Supreme Court, I feel that it would not be necessary to go into the question as to which of the two judgments should be followed, the reason being that the facts of both the cases before the Honourable Supreme Court are distinguishable from those of the instant case. In those cases, the respondents before the Supreme Court were not

> railway employees or were there any rules or instructions governing such cases of retention beyond the age of superannuation. As already indicated, the Western Railways have laid down the guidelines governing such cases and it is not disputed that the respective General Managers of all the railways in the country do have the powers to frame rules in respect of Group `C' and `D' employees of the concerned railways. The said guidelines were issued in the form of the letter dated 28.4.1989 which makes a specific provision for payment of salary for the period the employee continued in service beyond the age of superannuation which is payable at the rate at which pay was last drawn at the time when the employee attained the age of 58 years. I find no merit in the contention of the learned counsel for the respondents that para 2.1 of the aforesaid letter effects a change in respect of those employes whose cases arose on or after 12.7.1986. I am convinced that even those employees can be treated in the same way. Here, I may mention that some similarly situated employees seem to have been granted this benefit by the respondents. This is clear from a perusal of the Annexure IV, which is a copy of the letter dated 12.2.1996 from the Railway Board and according to which, ex-post facto sanction of the President has been granted and the irregular retention in service of one Shri Ali Mohd. who had been working beyond the age of superannuation, was treated as reemployment on usual terms and conditions. There is no reason why the applicant should be deprived of similar benefits especially when there is no plea raised by the respondent that the applicant had deliberately suppressed his correct date of birth or given a wrong date of birth or was otherwise responsible for his continued retention in service after the age of superannuation."

In our opinion, it cannot be said that by passing the impugned orders, the Tribunal has committed any error of law and/or jurisdiction which requires to be corrected by us. It is an admitted fact that both the respondents have actually worked. So far as respondent of Special Civil Application No. 8530 of 1998 is concerned, he had given his correct date of birth and he had not suppressed any fact. He was continued even after the date of superannuation. Reading the guidelines vide letter dated

April 28, 1989, a person can be continued after he reaches the age of superannuation. In fact, from the above extracted portion, it is clear that one Ali Mohmed was permitted to work beyond the date of superannuation and his case was treated as of reemployment on usual terms and conditions. We, therefore, see no reason to interfere with the order passed by the Tribunal so far as Special Civil Application No. 8530 of 1998 is concerned.

Regarding Special Civil Application No. 842 of 1999, it is clear that there the date of birth of the workman was not available. The case of the respondent workman was that his date of birth was July 6, 1937and not June 7, 1930. But after partition at the time of entry in India, on June 7, 1948, it was mentioned that he was 18 years of age and on that basis, his birth date was entered as June 7, 1930. He joined service on October 25, 1956. Therefore, considering his date of birth to be June 6, 1937 also, he could have entered in railway service in 1957. In the light of these facts and circumstances, if the Tribunal has held that he should not be directed to refund salary for the period for which he had actually worked, he should not be asked to refund the amount, it cannot be said that no such order could have been passed by the Tribunal.

In fairness, we must point out that our attention was also invited by Mr. Yagnik to a recent decision of the Supreme Court in Ramswaroop Masawan vs. Municipal Council , AIR 1999 SC 705. In that case, the employee was allowed to continue in service after due date of retirement. He was paid salary. The workman, however, wanted pensionary benefits on the basis of actual date of retirement. The High Court held that he would be entitled to get pensionary benefits on the basis of correct date of birth and his continuance must be treated as reemployment and it would not confer any right to receive pensionary benefits on that basis. When the matter reached the Supreme Court, the Court observed that there was no illegality in the order passed by the High Court .

In the instant cases also, both the respondents have actually worked and they have been paid salary. In our opinion, therefore,the Tribunal was right in holding that they cannot be asked to refund the amount of salary drawn by them. Regarding pensionary benefits, however, obviously , the actual date of birth must be taken into account which the Tribunal has done.

In the circumstances mentioned hereinabove, in our

opinion, no illegality can be said to have been committed by the Tribunal. For the above reasons, we see no ground to interfere with the orders passed by the Tribunal. Both the petitions deserve to be dismissed and are accordingly dismissed. Rule discharged. No order as to costs.

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